

2001 WL 35946012 (Hawai'i Cir.Ct.) (Trial Motion, Memorandum and Affidavit)  
Circuit Court of Hawai'i,  
First Circuit.

State of Hawaii,  
v.  
Clifford DANIELS, Defendant.

No. 01-1-1371.  
May 24, 2001.

Abuse of Family and Household Members

**Defendant's Motion in Limine #1; Declaration of Counsel; Memorandum in  
Support of Defendant's Motion in Limine; Exhibit A; and Notice of Motion**

[T. Stephen Leong](#) 6002-0, P.O. Box 3678, Honolulu, HI 96811, Telephone: 808/533-6664, Attorney for Defendant.

Honorable [Michael Wilson](#).

Trial Week: May 24, 2001

***DEFENDANT'S MOTION IN LIMINE #1***

Defendant Clifford Daniels, by and through counsel undersigned, moves the Honorable Judge presiding at trial for hearing prior to the commencement of trial in the above-entitled case, and moves the court for the following Orders:

1. *Jury Selection, Opening, Closing Recorded* -- an Order directing the court reporters to record (a) Jury Selection, (b) Opening Statements, and (c) Closing Arguments in this case pursuant to [State v. Moriwaki](#), 71 Haw. 347, 791 P.2d 392 (1990) [Hawai'i Supreme Court rules that, "Although [HRS § 606-12](#) does not require the recording of argument, we now *hold* that where a party makes a timely request, the trial court must order that closing argument be recorded."]. [71 Haw. at 357](#).

2. *Waiver of Conflict of Interest*: Counsel requests an on the record waiver of conflict of interest based upon 4(c) *infra*, or in the alternative moves that standby counsel be appointed, in the event Counsel becomes a necessary witness for Mr. Daniels.

3. *Witness Exclusionary Rule* -- an Order invoking HRE Rule 615 with instructions to the prosecutor and all witnesses for the State not to violate the rule.

4. *Inclusion of Evidence*-- an Order permitting for use at trial the following evidence, which the prosecutor may attempt to exclude:

a. That Complainant was motivated by jealousy because Defendant had been dating other women at the same time that he was dating her.

b. That Complainant attacked defendant at Kaumana cave on the prior weekend of February 19, 2001.

c. That Complainant was motivated to lie because Mr. Daniels refused to have sex with her following the biting incident.

d. That Complainant was exercising **financial** power over Defendant to keep him in the relationship.

e. That Complainant has a **financial** motive to lie and embellish her testimony in this matter based upon her pending lawsuit under Civil No. 01-1-1396-05. Pursuant to 609.1.

f. That Complainant filed a FCRO, i.e. FC-DA 01-1-0718, against Mr. Daniels to bolster her claim against Mr. Daniels.

5. *Exclusion Of Evidence* -- an Order excluding and precluding from use at trial the following evidence which the State may attempt to adduce:

a. Testimonial or documentary evidence relating to the defendant's alleged prior criminal record: Defendant has arrests and convictions more than 15 years old in Florida and Pennsylvania.

b. Testimonial or documentary evidence relating to any other "bad acts" involving the defendant for which no conviction was obtained; including but not limited to any irrelevant and undisclosed "bad acts" regarding the relationship of defendant with complainant which is not included in discovery.

c. Testimonial or documentary evidence relating to any unfavorable evidence against defendant and which may not technically be considered "bad acts" under HRE 404, but which should nevertheless be excluded as irrelevant under HRE 402, or as unfairly prejudicial under HRE 403; including but not limited to:

i. Information regarding any Warrant for Mr. Daniels arrest based upon failure to appear at a TRO hearing which had already expired TRO (Alejandro Rivera v. Daniels, DA 98-0-1252)

d. Hearsay and/or double hearsay which may be elicited from the State's witnesses and/or any co-defendants in violation of his rights to due process and right to confrontation;

i. including any hearsay of any alleged statements made by Defendant, based upon any hearsay statements made by witnesses whom the state will not be calling.

ii. including any hearsay of any alleged statements made by Complainant, based upon any hearsay statements made by witnesses whom the state will not be calling, including but not limited to:

(1) Statements of Complainant to:

(a) Bill George, her son

(b) Harlan Byrum, her marijuana supplier

(c) Unknown Security Guard who placed 911 call

(d) HPD Officer Doris Rohlf

e. All statements made by the defendant and to the police prior to trial, and statements and commentary by the police upon the defendant's utterances; including but not limited to unrelated notes attached hereto as Exhibit A, which indicate that Defendant has poor penmanship.

f. Any comment, inquiry, or testimony upon the defendant's post-arrest silence prior to trial, or any comment, inquiry, or testimony upon the defendant's or any co-defendant's invocation of his right to remain silent during trial;

- g. Any references to other cases involving this officer or other criminal numbers; and/or the results of those investigations; and
- h. Any reference to the complaining witness in this matter as being a “victim” of this crime, as this remains a jury matter.
- i. Any “course of investigation” evidence, which is irrelevant, hearsay and unfairly prejudicial to the defendant, including, but not limited to:
- i. Information regarding any Warrant for Mr. Daniels arrest based upon failure to appear at a TRO hearing which had already expired TRO (Alejandro Rivera v. Daniels, DA 98-0-1252)

This motion is brought pursuant to HRPP Rules 12, and 47, and is based the defendant's rights to Due Process of Law, Confrontation of the Witnesses Against Him, and right to a Fair Trial, as guaranteed by [Article I, Sections 5 and 14 of the Hawai'i State Constitution](#), and the 5th, 6th, and 14th Amendments to the United States Constitution, in addition to HRE Rules 103(c), 104(a), 402, 403, 404, 513, and 615. This motion is also based on the Declaration Of Counsel, the Memorandum In Support Of Motion In Limine, and any evidence which may be presented upon hearing of this motion.

DATED: Honolulu, Hawai'i, 5-4-01

<<signature>>

T. Stephen Leong,

Attorney for Defendant

#### ***MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE***

##### ***Background:***

Complainant has been charged with the offense of Abuse of Family and Household Members for an offense alleged to have been committed on February 28, 2001 regarding an altercation between Defendant and Complainant.

The anticipated defenses in this matter are Defense of Self, Defense of Other, Defense of Property. Defense expects to present evidence that Complainant had been upset on February 28, 2001-March 1, 2001 and was destroying Defendant's property and assaulting Defendant and at risk to injuring herself. In order to protect himself, his property and the Complainant, Defendant attempted to restrain her, resulting in these charges.

[Hawaii Rules of Evidence: RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES](#) provides in pertinent part:

- (a) Character Evidence Generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
- (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
- (3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, 609, and 609.1.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

Defense will be introducing evidence of Complainants attempts to dominate and control Defendant both sexually and financially and that the false complaint in this action was an attempt to get back at Defendant after he spurned her.

### *Other Types of Character Evidence or Bad Acts*

This Court must exclude all testimony concerning any alleged bad acts involving the defendant as a preliminary question of fact under HRE Rule 104(a). As a threshold matter, this Court must require the State to prove any alleged bad acts under a standard of *clear and* convincing evidence.<sup>1</sup> Furthermore, even if the State adduces adequate proof of such character evidence, the testimony must still be excluded as irrelevant under HRE 402, and unfairly prejudicial under HRE Rule 403, as was so held in *State v. Castro*, 69 Haw. 633, 756 P.2d 1033 (1988), *State v. Austin*, 70 Haw. 300, 769 P.2d 1098 (1989), *State v. Pinero*, 70 Haw. 509, 778 P.2d 704 (1989), and *State v. Pemberton*, 71 Haw. 466, 796 P.2d 80 (1990).

In *Castro*, the Hawai'i Supreme Court reversed defendant's attempted murder conviction because evidence from the complainant that the defendant previously "slapped her, punched her, threatened her while wielding a knife, held a gun to her head, raped her, and threatened her on the telephone," 756 P.2d at 1039-40, was improperly admitted in violation of HRE Rule 403. The Court ruled that even though such evidence sometimes may have probative value to an issue at trial, the *incremental probative value* of such evidence did not justify its admission into evidence, where the danger of unfair prejudice to the defendant existed.

[I]n deciding whether the danger of unfair prejudice ... substantially outweighs the *incremental probative value*, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

756 P.2d 1041. [emphasis added]. In *Castro*, the trial court abused its discretion in admitting the evidence, where it had no significant incremental probative value on issues of intent, preparation, plan, knowledge, or modus operandi.

In *Austin*, the Hawai'i Supreme Court took *Castro* even further by focusing on the "need for the evidence" and "efficacy of alternative proof" when it ruled that:

HRE Rules 403 and 404 specifically prohibit the introduction of prejudicial character evidence unless (1) an exception applies; and (2) there exists no other way to prove the accused's guilt.

769 P.2d at 1101. [emphasis added]. This further requirement was prompted because of potential jury hostility against the defendant.

In *Pinero*, the defendant was charged with murder for causing the death of Officer Ronk who was attempting to serve a court order upon the defendant. Pinero had allegedly grabbed Ronk's revolver in a struggle and fired it at the officer. The defendant's conviction was reversed, in part because of the erroneous admission of evidence showing that 1 year earlier, the defendant

grabbed the revolver of an Officer Mattos who was also trying to serve a court order upon him. Although the State contended that this prior bad conduct was probative to rebut a defense of “accident,” the Hawai’i Supreme Court ruled that: The evidence may have been relevant, but it had a tendency nonetheless to distract the trier of fact from the main question of what happened on the particular occasion described in the complaint by suggesting that because Clyde Pinero was a person of criminal character, it was likely that he committed the crime for which he was on trial....

What was admitted here was evidence of a year-old incident in which Pinero attempted to wrest a gun away from another police officer who came upon him under somewhat similar circumstances. Since Takayama earlier testified about seeing Ronk's service revolver in Pinero's hand, we cannot say the need for the evidence Mattos had to offer was great. But *the evidence given by him was such that there was a probability of a hostile reaction against Pinero*. We would have to say on balance, its admission constituted an abuse of discretion.

[State v. Pinero, 70 Haw. 509, 518, 778 P.2d 704, 711 \(1989\)](#). Thus, the defendant's conviction was reversed. Under the authority above, any evidence of alleged bad acts of the defendant in this case must be excluded from trial.

In *Pemberton*, the defendant was charged with assault for using a knife in a fight. On appeal, the defendant's convictions were reversed, because evidence that the defendant also used a knife in another fight on a prior occasion was *not* admissible under HRE 404(b) as substantive proof of modus operandi, intent, absence of mistake, or for any other reason:

[T]estimony that defendant had previously provoked a fight using a knife was clearly inadmissible as it was *not relevant for any purpose* under 404(b) and could only prejudice defendant by showing defendant's propensity towards provoking fights with a knife: the very inference [Rule 404](#) was meant to prohibit.

[71 Haw. at 473](#). [emphasis added]. The Supreme Court ruled that the erroneous admission of evidence was not harmless beyond a reasonable doubt.

### ***Other “Unfavorable” Evidence***

Other unfavorable evidence, though not technically considered “bad acts” under HRE 404, must also be excluded as irrelevant under HRE 402, or as unfairly prejudicial under HRE 403.

### ***Evidence of Bias***

In the present case, Complainant is biased because Defendant sought comfort from another woman after Complainant began exhibiting bizarre behavior. Defendant sought to break off the relationship and Complainant refused to let him go. Complainant sought to **exploit** Defendant **financially** and sexually. The police were called when he refused to perform for her.

A witness's potential **financial** interest in the outcome of a criminal case is probative of bias and therefore credibility. [State v. Liuafi, 1 Haw.App. 625, 623 P.2d 1271, \(Hawai’i App. 1981\)](#). In the present case Complainant is seeking monetary damages against defendant and counsel for representing defendant in these proceedings. The credibility of a prosecuting witness in a criminal case is always relevant, and cross-examination directed toward revealing possible biases, prejudices or ulterior motives of the witness is a proper and important function of the constitutionally protected right of cross-examination. [Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 \(1974\)](#). See [Smith v. State of Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 \(1968\)](#) and [Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 \(1931\)](#).

“An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, that is enough.” [McCandless v. United States](#), 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed. 1205 (1953).

### *Hearsay*

Any hearsay evidence must be *excluded* because it violates the defendant's right to confront the witnesses against him under [Article I, Section 14, of the Hawai'i State Constitution](#) and the 6th and 14th Amendments to the United States Constitution. [State v. Adrian](#), 51 Haw. 125, 453 P.2d 221 (1969); [State v. Rodrigues](#), 7 Haw.App. 80, 742 P.2d 986 (1987); [State v. Lincoln](#), 71 Haw. 274, 789 P.2d 497 (1990).

In *Adrian*, the Hawai'i Supreme Court held that the trial court committed reversible error when it admitted into evidence letters and documents from the declarant who did *not* testify at trial. The Court stated that the purpose of Confrontation is:

Not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand *face to face* with the jury in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief.

[51 Haw. at 132](#). [emphasis added]. The Court further stated that “the right of confrontation *supersedes* the effect of any rules of evidence,” [51 Haw. at 133](#), so that even if hearsay could fall within an exception under HRE 803 or 804, such evidence must still be *excluded* as a violation of the defendant's constitutional right to confront the witnesses against him.

This mandate was made clear in *Rodrigues*, where the Hawai'i Intermediate Court Of Appeals ruled that *before* hearsay can be admitted under some rule of evidence, the State must first prove that the declarant is *presently unavailable*<sup>2</sup> to testify *and* that the statement itself is *reliable* through independent corroborating evidence, because the right of confrontation “includes the opportunity to cross-examine the declarant himself, not any witness who might relate the declarant's statements.” [742 P.2d at 991](#). *Rodrigues* thus *overrules* the line of cases culminating in [State v. Feliciano](#), 2 Haw.App. 633, 638 P.2d 866 (1982), because the Court assumed in both cases, that the challenged out-of-court statement *was* admissible for some purpose under the rules of evidence,<sup>3</sup> but it nevertheless violated the defendant's constitutional right to confront the witnesses against him. *See also State v. Braxter*, 568 A.2d 311 (Rhode Island, 1990).

Furthermore, in *Lincoln*, the Hawai'i Supreme Court again emphasized that “reliability” is the cornerstone of any hearsay exception. The Court reversed the defendant's murder conviction because the trial court erroneously admitted prior trial testimony of an unavailable witness, even though the prior testimony was admitted in compliance with the literal application of the HRE 804(b)(1) exception to the hearsay rule. The Supreme Court held that the prior testimony was *not reliable* (even though the witness was originally subjected to cross-examination) because it was recanted, then adopted, by the witness -- the Court also held that “the mechanistic application of the hearsay exceptions is inappropriate.” Defense further submits that any statements of co-defendants who do not testify would violate Defendant Le's right to confront witnesses and must therefore be excluded, Defendant Le requests a pre-trial ruling that a severance should be issued should the statements of any co-defendant be introduced by the prosecutor through any of it's witnesses through those of any co-defendant's counsel.

“As the rules of evidence now stand, police and law enforcement reports are not admissible against defendants in criminal cases. This is made quite clear by the provisions of rule 803(8)(B) and (C). [United States v. Oates](#), 560 F.2d 45, 70 (2d Cir. N.Y. 1977) furthermore, “public agency reports under Rule 803(8) may not be received merely because they satisfy Rule 803(6) and that section (6) does not open a back door for evidence excluded by section (8). [United States v. Cain](#), 615 F.2d 380 (5th Cir. La. 1980). HRE 803(b)(8) provides:

The following [is] not excluded by the hearsay rule, even though the declarant is unavailable as a witness: Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency,

or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however in criminal cases matters observed by police officers and other law enforcement personnel*, or (C) in civil proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

### ***Statements Made To The Police/ Police Comments***

All statements made to the police must be excluded under a voluntariness test as set forth in [HRS §621-26](#). And, even if this Court finds such statements to have been uttered “voluntarily,” any commentary or statements made by the examiner or person interviewing the defendant must be excluded as irrelevant under HRE Rule 402, and prejudicial under HRE [Rule 403](#). See *State v. Valenzuela*.

### ***Adverse Comment Upon The Right To Remain Silent***

It is a long-standing principle of law that absolutely no adverse comment upon a defendant's right to remain silent may be made to the jury for substantive purposes as evidence of guilt, [Griffin v. California](#), 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229, or for purposes of impeachment during cross-examination, [Doyle v. Ohio](#), 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976), or during closing arguments by the State, eg. [People v. Bulliner](#), 220 Ill.App.3d 438, 581 N.E.2d 86 (1991). Accord *State v. Melear*, 63 Haw. 488, 630 P.2d 619 (1981), *State v. Padilla*, 57 Haw. 150, 552 P.2d 357 (1976).

In *People v. Bulliner*, *supra*, the Appellate Court of Illinois reversed the defendant's conviction for attempted murder and aggravated battery because the prosecutor during closing argument stated that if the defendant's story about self-defense was true, he would have told the police about it, thus commenting on the defendant's post-arrest silence. The Court noted: [D]uring closing arguments, the assistant State's Attorney stated: “I submit to you, Ladies and Gentlemen, there was no fight between the two of them. Joe Clay was fighting for his life. That's the only fight that was going on down there, and *if the Defendant had any injuries on his body he would have told the police about it*.”

No objection was made to the questions or closing arguments. On appeal, defendant argues that the questions and comments quoted above violated his right to remain silent as guaranteed by the fifth amendment of the United States Constitution [*see Miranda v. Arizona* (1966), 384 436, 86 S.Ct. 1602, 16 L.Ed.2d 694], since his post-arrest silence was used against him to undermine his credibility. We agree.

In *People v. Monaghan*, (1976), 40 Ill.App.3d 322, [352 N.E.2d 295](#), this court relied on the decision in *Doyle* in reversing a conviction where the assistant State's Attorney was allowed to impeach a defendant's exculpatory trial testimony with his failure to inform the police of his explanation following his arrest. Similarly, in *People v. Adams* (1981), 102 Ill.App.3d 1129, 58 Ill.Dec. 325, [430 N.E.2d 267](#), the appellate court ruled that it was reversible error for the prosecutor to comment on a defendant's post-arrest silence.

220 Ill.App.3d 441-42, 581 N.E.2d 88-90. [emphasis added]. Thus, under the authority above, this Court must preclude any comment, inquiry, or testimony upon the defendant's post-arrest silence prior to trial, or any comment, inquiry, or testimony upon the defendant's invocation of his right to remain silent during trial.

### ***Course of Investigation***

Course of investigation evidence is not relevant to Guilt or Innocence, and is therefore irrelevant background evidence which the prosecutor may attempt to use to 1) bolster the credibility of his witnesses and 2) unfairly prejudice the defense.

cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.

[McCormick on Evidence § 249 at 104 \(4th Ed. 1992\)](#)

DATED: HONOLULU, HAWAII, 5-24-01

<<signature>>

T. STEPHEN LEONG,

#### Footnotes

- 1 The admissibility of prior bad acts is a matter for the trial court to determine, not the jury. *State v. Matteson*, 287 N.W.2d 408, 410 (Minn. 1979). The test of “clear and convincing” proof of a prior bad act is the rule of many state courts; see *Adkinson v. State*, 611 P.2d 528, 532 (Alaska 1980), cert.den. 449 U.S. 876, 101 S.Ct. 219, 66 L.Ed.2d 97 (1980); *Price v. State*, 267 Ark. 1172, 599 S.W.2d 394, 397 (1980); *State v. Just*, 184 Mont. 262, 602 P.2d 957, 963 (1979); *State v. Forsland*, 326 N.W.2d 688, 692 (N.D. 1982).
- 2 “Presently unavailable” means at the time the evidence is offered at trial. In *Rodrigues*, efforts to locate the missing witness were made up to 10 days before trial. However, the Court ruled that because no efforts were made from that point up to the time of trial, the State failed to make an adequate showing of “unavailability,” and the evidence was not admissible. As to the proof of unavailability made 10 days before trial, the Court noted that, “[T]he State's showing was in the wrong place at the wrong time.” 742 P.2d at 991.
- 3 In *Rodrigues*, the Court noted that, “In the disposition of this appeal, we will assume that the hearsay testimony was admissible. We need not, and do not, decide whether the testimony was admissible as an exception to the hearsay rule.” 742 P.2d 988, footnote #2. In *Feliciano*, the constitutional question of confrontation of witnesses was neither raised, nor addressed, by the Court.